

FEDERAL CIRCUIT COURT OF AUSTRALIA

*GILL & ORS v MINISTER FOR IMMIGRATION
& ANOR*

[2016] FCCA 794

Catchwords:

MIGRATION – Judicial review – skilled visa requirement for 900 hour work experience – bogus document.

Legislation:

Migration Act 1958 (Cth), ss.5, 97

Migration Amendment Regulations 2011 (No. 1) (Cth), reg.5(2)

Migration Regulations 1994 (Cth), sch.4

Cases cited:

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

NAHI v Minister for Immigration and Indigenous Affairs [2004] FCAFC 10

Minister for Immigration and Citizenship v SZGUR [2011] HCA 1

First Applicant:	JASVINDER SINGH GILL
Second Applicant:	PARMINDER KAUR
Third Applicant:	PARINAJ GILL
Fourth Applicant:	MEHTAB SINGH GILL
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 1078 of 2015
Judgment of:	Judge Harland
Hearing date:	29 February 2016
Date of Last Submission:	29 February 2016
Delivered at:	Melbourne

15 April 2016

REPRESENTATION

Applicant: _____ Appeared in person ☐

Counsel for the Respondents: Mr Brown

Solicitors for the Respondents: Australian Government solicitor

ORDERS

- (1) The application for judicial review filed on 14 May 2015 is dismissed.
- (2) The applicant is to pay the first respondent's costs fixed in the sum of \$5,000.
- (3)
- (4)
- (5)
- (6)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1078 of 2015

JASVINDER SINGH GILL

First Applicant

PARMINDER KAUR

Second Applicant

PARINAJ GILL

Third Applicant

MEHTAB SINGH GILL

Fourth Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. The applicant in this matter filed an application for judicial review on 14 May 2015. The application was prepared with the assistance of a migration lawyer who later ceased acting for the respondent. The grounds are as follows:

1. The Second Respondent misinterpreted Item 4020(1) of Schedule 4 of the Migration Regulations (PIC 4020)(1).

Particulars

(a) The evidence relied upon by the Second Respondent, being the statement by Mr CA that some students who obtained false references did some work, but less than 900 hours of work, for the respective employers was not sufficiently probative as the maker of the statement was not in a position to know its truth in relation to its students; and

(b) The Second Respondent did not make a finding as to the credibility of witnesses; and

(c) The Second Respondent relied on an absence of positive evidence as evidence of the contrary.

2. The applicant applied for a skilled visa with his work category being a pastry cook on 29 September 2009. The Delegate issued a decision on 10 October 2012 to refuse the applicant's visa application on the basis that he did not meet the criteria for his visa. The *Migration Regulations 1994* (Cth) were amended after the applicant lodged his visa application. One of the amendments was to introduce into part 1 of schedule 4, an additional clause, being clause 4020. The clause is set out as follows:

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

3. The amendments apply to the applicant by reason of regulation 5(2)(a) of the *Migration Amendment Regulations 2011* (No. 1) (Cth) because his application had not been finally determined before 2 April 2011 when the amendments were introduced. It is also necessary to refer to the definition of a bogus document, which is referred to in ss.5 and 97 of the *Migration Act 1958* (Cth). Section 5 is set out as follows:

***"Bogus document"** , in relation to a person, means a document that the Minister reasonably suspects is a document that:*

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

4. The applicant says he worked for Pastry Art Design for 900 hours. It is a requirement of his visa that he obtain 900 hours of work experience as a pastry cook. The refusal of the applicant's visa focuses on this requirement.
5. The Department sent the applicant an invitation to comment on his application for a visa on 11 July 2012. That letter refers to the public interest criterion, being PIC 4020, and the requirement that no evidence is given to the Minister that is a bogus document or information as false or misleading in material particular with respect to the visa. The letter sets out that issue and provides documents with respect to the criminal conduct of CA and includes redacted documents from his criminal proceedings wherein Mr CA admitted to creating false work references and selling them to students, employers and migration agents. He says that Pasty Art Design was one of the employers who used the false references.
6. The last page of the bundle of documents sent to the applicant is an extract from a warrant which shows that the applicant was one of the class of people who Mr CA held false references for. The documents

make clear the nature of the allegation which the applicant was required to answer. The applicant responded providing documents which appear at Court Book (“CB”) 179 and 180, being a statutory declaration signed by Mr Ploumidis, who is an owner of Pastry Art Design and a letter from the applicant. Mr Ploumidis says in his statutory declaration that the applicant worked on a volunteer basis at his bakery from 10 March 2008 to 8 April 2009.

7. He says that the applicant worked as per his visa conditions and completed more than 900 hours under his supervision. The applicant says in his supporting letter that he received the reference from Mr Ploumidis after he completed his 900 hours of work experience. He says he has never met Mr CA and was shocked when he received the email from the Department.
8. The applicant says he is not able to provide any pay slips, group certificate or tax assessment notice as he did voluntary work at Pastry Art Design. He says the only documentary evidence he can provide is his statutory declaration. The Delegate refused to grant the applicant his visa, finding that he did not meet the conditions. The applicant then sought a review of the Delegate’s decision and appeared at a hearing of the Tribunal. The decision affirming the Delegate’s decision to refuse the visa was issued on 22 April 2015.
9. The Tribunal sets out the background and refers to the requirement of PIC 4020, which is part of the requirement of clause 485.224 for the grant of the visa. PIC 4020 requires that there is no evidence that the applicant has either given or caused to be given, any bogus document or information to the Minister, an officer, the Tribunal, or any relevant assessing authority. This would include documents provided to the Trades Recognition Australia (“TRA”). One of the requirements of the visa is to obtain a successful skills assessment from the TRA.
10. The requirement not to provide a bogus document applies whether or not the Minister becomes aware of the bogus document and significantly, the applicant provided the bogus documents knowingly or unwittingly. The decision of *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 addresses this point. In that case, the appellants unsuccessfully argued that the appellant had to be

knowingly involved in giving false information for PIC 4020 to apply. At paragraphs 32 and 33, Buchanan J says:

“It is apparent from the terms of PIC 4020 that it addressed the problem of attempts to work a fraud or deception on the assessment of claims for a visa. That is also evident from the fact that PIC 4020 states a “public interest” criterion, from the narrow and exceptional circumstances necessary to waive its requirements and, more generally, from the serious consequences that follow from its application. I would not infer any apparent intention to disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them. PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters. However, different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.

“In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody’s part, and in my view does so in the present context.”

11. I also refer to paragraph 49 which makes a significant comment on this issue:

“For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents

are false in a material particular; but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.”

12. The applicant submitted a work reference from Mr Ploumidis to the TRA, which stated that the applicant had completed more than 900 hours as a pastry cook from 10 March 2008 to 8 April 2009. The Tribunal decision records that whilst the applicant’s visa application was being processed, there was an investigation conducted by the Department with respect to a number of visa applicants who were identified as having paid for work references to support their skills assessment applications to the TRA.
13. The investigation centred on the activities of Mr CA who admitted to creating fraudulent documents for skilled migration purposes, including work reference letters. He gave a statement to police and parts of the documents from those proceedings, as indicated before, were provided to the applicant with redactions. Mr CA said that he created false references to show that students had completed the 900 hours required and that Pastry Art Design and Mr Ploumidis was one of the businesses involved in the false references.
14. The Australian Federal Police conducted a search of Mr CA’s home and located hundreds of documents on a USB stick that provided hundreds of names of students and false work reference and the applicant was one of those whose details were filed on this USB stick. Mr CA gave evidence that Mr Ploumidis was one of a number of employees who agreed to be involved in the fraudulent scheme and he said that many students had no inclination to work the 900 hours and therefore paid for a false reference and that he would encourage the students to do at least some work experience.
15. As indicated previously, the applicant stated that he had worked the 900 hours and relied on the statutory declaration provided by Mr Ploumidis. The Tribunal issued an invitation to the applicant to comment on the adverse information. The Tribunal decision also records that the Department of Immigration responded to a summons to produce documents on 7 October 2014 which included the work reference the applicant provided the TRA and the Department, which

was “*almost identical in content, wording, format and structure*” to the documents seized from Mr CA’s computer.

16. At the Tribunal hearing, the applicant provided a statutory declaration from Mr Michael Karfut, manager of Pastry Art Design, where he said he verified that the applicant had obtained 900 hours of voluntary work experience at Pastry Art Design. Both the applicant and Mr Ploumidis gave evidence to the Tribunal.
17. The applicant gave evidence that he had never met Mr CA and said that he completed more than 900 hours of work at Pastry Art Design but said that neither he nor his employer kept records of the hours worked.
18. Mr Ploumidis gave evidence to the effect that the college kept records of the students’ work hours and that teachers from the college would set up rosters and sign off on them at the end of each week and they would provide Mr Ploumidis with a weekly spread sheet and confirm which students had been there and which students had not. He said that the school would penalise students who had not turned up for their work experience.
19. He claims that he did not keep any records himself because of some “grey areas” with respect to Pastry Art Design’s WorkCover in relation to students. He also gave evidence that Mr CA held a grudge against him. The Tribunal noted that the period of time which the applicant claimed to have worked at Pastry Art Design coincided with the period when Mr CA was engaged in fraudulent activities.
20. At paragraph 44 of the decision, the Tribunal referred to the fact that PIC 4020 requires or implies a requirement for probative evidence and the issue is whether or not the applicant gave or caused to be given a bogus document, not whether the document in question was bogus. The Tribunal referred to section 5 of the Act which defines bogus documents and noted that there is only a requirement that is a reasonable suspicion that a document is bogus.
21. The Tribunal accepted that the applicant may have done some work experience at Pastry Art Design as he knew the names of some people who worked there and was able to describe the business including its layout and where it was located. The Tribunal observed that this was

not inconsistent with Mr CA's evidence that some students who obtained the false references did do some work but less than the 900 required hours.

22. The Tribunal recorded the evidence of the applicant and Mr Ploumidis, that neither of them kept any record of the applicant's attendance but that the college did. The Tribunal took into account the fact that the applicant did not obtain any supporting documents from the Tribunal despite saying that the Tribunal had documents that would verify what he was saying.
23. The Tribunal member also acknowledged that Mr Ploumidis was not being charged with any criminal activity but found that it could not be satisfied that Mr Ploumidis had no reason to support applicants who were not genuine as he may wish to defend his reputation. Mr Ploumidis gave evidence that the Tribunal should not place any weight on the fact that a false reference was found on Mr CA's premises, given the fact that he has been convicted for creating false references.
24. The Tribunal observed that Mr CA did not claim any of the reference letters he had were genuine and he pleaded guilty with respect to all of the documents found in his possession. It was also observed that neither the applicant nor Mr Ploumidis provided any explanation to the Tribunal as to how Mr CA would be in possession of a genuine work reference.
25. At paragraph 55 the Tribunal says having considered the totality of the evidence, it found that the applicant had not completed the required 900 hours of work and that he had obtained a false reference letter. The Tribunal was also not satisfied that there was any compelling or compassionate circumstances to give rise to the requirements of PIC 4020(1) to be waived.
26. **Submissions before the court**
27. Essentially the applicant's complaints focus on disagreeing with the result or the conclusions that the Tribunal reached. The applicant did not file any written submissions in accordance with the directions made by the Registrar on 15 September 2015 but did make brief oral submissions and acknowledged having received the first respondent's

written submissions. The applicant referred to paragraphs 45, 51 and 56 of the Tribunal's decision.

28. Paragraph 45 of the decision refers to the definition of bogus documents and the fact that it is only necessary for the Minister to have a reasonable suspicion that a document was obtained because of a false or misleading statement. The applicant complains that Mr CA could not know whether or not the applicant completed the 900 hours. However, that is not what the decision is saying. It refers to a statutory definition of a bogus document. It only requires the minister to have a reasonable suspicion. It does not matter if the applicant is aware of it or not.
29. The applicant also complains about paragraph 51, which is where the Tribunal refers to Mr Ploumidis' evidence and the assessment that Mr Ploumidis did have reasons to give evidence in support of applicants who were not genuine in order to protect his reputation.
30. Finally, the applicant complains about paragraph 56 of the decision and he is complaining that if the document was not valid, how could the TRA accept the assessment as valid. It is clear that what the issue here is that the TRA were relying on a false document in order to make that assessment. Mr Brown appearing for the Minister relied on his written submissions and also handed up a folder of authorities.
31. He submits that it is clear from the Tribunal's decision and in light of the material for it, including what I have referred to previously, that the Tribunal weighed the evidence and in that process of reasoning, placed more weight on the criminal proceedings of Mr CA and the documents seized than the oral evidence of the applicant and Mr Ploumidis. Much of the applicant's complaint is about weight which is a matter for the Tribunal as the finder of fact.
32. The chain of reasoning of the Tribunal member is clear and he is clearly entitled to weigh up the evidence with respect to the documents and the evidence provided by the applicant and Mr Ploumidis. The Tribunal was entitled to make a finding that if the college had records supporting the applicant's claim then the applicant could have obtained those records from the college. As the decision of *NAHI v Minister for Immigration and Indigenous Affairs* [2004] FCAFC 10 makes clear, it

is not necessary for a Tribunal to make credibility findings with respect to the applicant and his supporting witnesses in order to assess the evidence in the way it has.

33. Obtaining 900 hours of work experience is a significant number of hours and there is no documentary evidence from the applicant, Mr Ploumidis or from the college, to support the applicant's contentions that he had obtained that work experience. Those are issues that the Tribunal was entitled to take into account when weighing it up against the documentary material with respect to Mr CA. It is apparent from the decision that the Tribunal quite properly weighed up the competing evidence and made its findings that were open to it.
34. Rather than relying on an absence of positive evidence as evidence of the contrary, as the applicant complains, it is clear from a fair reading of the decision that the Tribunal weighed up the competing evidence in reaching the conclusions that it did. The applicant's complaint is also seeking to reverse the onus. It is for the applicant to establish his case: *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1 at [67]. The findings that the Tribunal made were open on the evidence before it and this Court does not have the power to interfere with the findings of fact, even if the Court would have arrived at a different conclusion. In this case, I am satisfied that it was open on the evidence for the Tribunal to reach the conclusions that it did.
35. **Costs**
36. Mr Brown sought costs in the sum of \$5,000 in the event his client was successful. The scale provides for costs to be awarded in the amount of \$6,824, therefore the amount is well under the scale allowed. Mr Singh was invited to make submissions in reply to the costs issue after I explained that costs normally follow the event and that if he was successful he would be entitled to claim legal costs, given that he had lawyers prepare his initiating documents for him. The applicant did not wish to say anything with respect to the costs issue.
37. I dismiss the application and order the applicant to pay the first respondent's costs.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Judge Harland

Date: 15 April 2016